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June 27, 2014

Lynn Fraser, Director
Alternative Dispute Resolution Office
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: ADR # 724

Dear Ms. Fraser:

I represent the International Association of Heat and Frost Insulators and Allied Workers Political Action Committee ("the Committee") and its Treasurer, James P. McCourt.

I am writing to state the position of the Committee and Mr. McCourt in this matter. As explained herein, the Committee contends that, because it satisfied the "best efforts" standard of 2 U.S.C. § 432(i), the Committee did not violate the Federal Election Campaign Act of 1971, as amended ("the Act"). No basis therefore exists to impose a civil fine or other penalty. Alternatively, the same conclusion could be reached – that no fine or penalty should be imposed – by considering the factors listed in the Commission's Policy Regarding Self-Reporting of Campaign Finance Violations, 72 Fed. Reg. 16695 (April 5, 2007). Essentially, the Committee's view is that it has been the victim of an unforeseeable event, a crime for which it is not at fault.

The summary in your letter of June 14, 2014 is accurate, but there are other relevant facts and recent developments that warrant consideration.

The Committee

The Committee is a separate segregated fund organized by the International Association of Heat and Frost Insulators and Allied Workers ("Insulators") in 1979. Its funds are derived entirely from the voluntary contributions made by union members in the United States. The Committee makes contributions to both federal

Lynn Fraser, Director

June 27, 2014

Page 2 of 8

and state candidates. Because the Insulators is relatively small, the funds available to the Committee are relatively limited. Those funds are kept in a single checking account at PNC Bank in Maryland.

The Insulators pays some, but not all of the Committee's administrative expenses. Since its inception, a secretary employed by the Insulators has been responsible for performing certain clerical tasks associated with the operation of the Committee, including the preparation of checks. From 2001 to 2011, that secretary was Cora Carper. Ms. Carper's job duties included preparation of checks to make authorized contributions and recording the Committee's receipts and expenditures.

For many years, most likely from its inception, the Committee has had in place several safeguards to prevent misappropriation of funds. The preparation of checks required prior authorization, and more recently prior written authorization. The responsibility for depositing receipts was divided among several office employees, so that no one person had that task, and the person responsible for making a deposit was generally not the person responsible for recording the deposit. And, bank statements were reviewed, not only by Ms. Carper but also by the Committee's treasurer, James McCourt and by the Insulators' office manager.

The Embezzlement

During 2011, based on her conduct and demeanor in the office, it became apparent that Cora Carper had a drug abuse problem. She was sent to a drug rehabilitation facility at the Insulators' expense. In May 2011, after returning from rehabilitation, Ms. Carper was discharged because she failed a drug test.

Sometime after Ms. Carper's discharge, Mr. McCourt instructed the Insulators' office manager to review the Committee's records to ascertain whether there had been any impropriety. As a result of that review the Committee and the Insulators learned, to their great shock and dismay, that Cora Carper – who had been a long term and trusted employee – had embezzled several hundred thousand dollars from the Committee in her last several months of employment. More specifically, between June 2009 and February 2011, she had written over 300 checks payable to cash, endorsed those checks with her own signature, and cashed them at a local branch of PNC.¹ The total taken from the Committee was approximately \$500,000.

¹ PNC inexplicitly cashed those checks in contravention of its own policy on handling institutional checks payable to cash.

Lynn Fraser, Director

June 27, 2014

Page 3 of 8

A question asked, after discovering the embezzlement, was why the Committee failed to discover the embezzlement sooner, particularly with two persons other than Ms. Carper reviewing the bank statements. The answer was found largely in the inadequacy of the bank statements themselves. These statements included copies of some, but not all, of the checks written on the account. Copies of checks payable to cash appear not to have been included. A second possibility is that Ms. Carper removed and destroyed the checks before the statements were distributed. And, in many instances, the bank statements failed to disclose the serial numbers of checks written on the account, listing the number for several checks as "000."

The Criminal Case

After discovering the misappropriation of funds, the Insulators immediately notified the Department of Labor which enforces that part of the Labor-Management Reporting and Disclosure Act making the embezzlement of union funds a federal crime. 29 U.S.C. § 501(c). The Department of Labor conducted an investigation in which the Insulators and the Committee cooperated fully. The Department of Labor referred the matter to the U.S. Department of Justice for prosecution, and in November 2012 a federal grand jury returned a six-count indictment against Cora Carper. A copy of that indictment is enclosed.

In July 2013, Ms. Carper pled guilty to a single count of embezzlement. She was sentenced to 37 months of imprisonment in a federal prison and 3 years of supervised release and ordered to make restitution of the \$495,286 that she embezzled from the Committee. A copy of the judgment entered is enclosed.

Proceedings before the FEC

The Commission's policy states that, if a misappropriation of funds is discovered, a political committee should notify not only the appropriate law enforcement authority, but also the Commission. In January 2012, acting in accordance with that policy, the Committee notified the FEC that Committee funds had been embezzled. The Committee also filed a complaint with the FEC against Cora Carper, alleging, *inter alia*, that her embezzlement of funds had prevented the Committee from filing accurate reports with the Commission.

In response to the complaint, the Commission opened a Matter Under Review, designated MUR 6526. In August 2013, the Commission notified the Committee that it had entered into a final conciliation agreement with Cora Carper

Lynn Fraser, Director
June 27, 2014
Page 4 of 8

pursuant to which an addendum had been added to her plea agreement. In that addendum, which is enclosed, Ms. Carper acknowledged that she knowingly and willfully violated the Act by comingling the Committee's funds with her personal funds. In the addendum, the Commission also stated that "[i]n light of the financial circumstances of the Defendant [the Commission] seeks no civil penalty in its conciliation of this matter."

The Commission also opened a Pre-Matter under Review, Pre-MUR 531. The Committee cooperated fully in the Commission's investigation of that Pre MUR. In January 2012, Committee Treasurer, James McCourt, met with Assistant General Counsel Peter Blumberg and Deputy Assistant General Counsel Stephen Gura to answer questions about the Committee's loss of funds. During the months that followed, the Committee provided numerous documents and responded to several requests for information from Commission attorney Dawn Odrowski. And, the Committee worked with the Commission's reports analysts to amend its reports in the manner suggested by the Commission.

Repayment by the Bonding Company

The Insulators maintains a bond to insure itself against, *inter alia*, misappropriation of funds. When it discovered the embezzlement of funds, the Committee notified the bonding company, Fidelity and Deposit Company of Maryland, of the loss. In February 2012, that company paid the Committee \$499,200 as reimbursement for that loss. The bonding company later paid the Committee an additional \$10,000 as reimbursement for expenses, primarily legal fees, incurred in seeking restitution from PNC Bank. Accordingly, because the Insulators maintained insurance that covered the Committee, the embezzlement did not result in any loss to the Committee.

After those amounts were received, the Committee again worked with the Commission's analysts to report those receipts to the Commission in the appropriate manner.

Adoption of Additional Controls

The embezzlement took place despite the presence of most of the internal controls referenced in the Commission's Statement of Policy on Misreporting Due to Embezzlement. 72 Fed. Reg. 16695 (April 5, 2007). The Committee had one bank account and that account was opened in the name of the Committee. The bank statements were reviewed by people other than the employee responsible for

Lynn Fraser, Director

June 27, 2014

Page 5 of 8

preparing checks. Bank deposits were made by people other than the employee responsible for receiving and recording receipts. All checks required written authorization and two signatures (although the capability existed for using the Committee's computer software to apply those signatures). The Committee has never had or used a petty cash fund. Those safeguards, however, failed to prevent Ms. Carper from misappropriating Committee funds.

After the embezzlement was discovered, the Committee adopted additional controls. It made arrangements with the bank for more informative and accurate bank statements, which now include copies of all checks written on the Committee's account. The Committee has also assigned an employee, other than the employee responsible for writing checks, the task of reconciling the bank statements with the Committee's accounting records. Ms. Carper's replacement does not have access to blank checks or the ability to print checks at her desk. She can print checks only at a printer in the office manager's office. Because she must retrieve checks from the office manager, it is no longer possible to print checks surreptitiously.

The Committee Satisfied the Act's "Best Efforts" Standard

Section 432(i) of the Act provides that

When a treasurer of a political committee shows that best efforts have been used to obtain, maintain and submit the information required by this Act for the political committee, any report or other records of such committee shall be considered in compliance with this Act . . .

2 U.S.C. § 231(i); see 11 C.F.R. §§ 104.7(a), 111.35(b)(3).

In 2007, in response to the district court decision in *Lovely v. FEC*, 307 F. Supp. 2d 294 (D. Mass. 2004), the Commission announced that it would apply the "best efforts" defense when reviewing any alleged violation of the Act's recordkeeping and reporting requirement, "whether arising in its traditional enforcement docket (Matters Under Review), audits, or the ADR program. 72 Fed. Reg. 31438-40 (June 7, 2007). Accordingly, the "best efforts" standard should be applied here.

In applying that standard, the Commission considers 1) the "actions taken or systems implemented" to insure that required information is obtained and reported; 2) the cause of the failure to obtain and report information; and 3) the specific efforts of the committee to obtain and report the information at issue. *Id.* at 31440.

Lynn Fraser, Director

June 27, 2014

Page 6 of 8

Consideration of those criteria here shows that the Committee satisfied the "best efforts" standard.

At the time of the Committee's loss, it had in place various systems to avoid and detect misappropriation of funds (and therefore to avoid the failure to file accurate reports that might result from such misappropriation). The Committee assigned two employees, other than the employee responsible for preparing checks, the task of reviewing the Committees' bank statements. Bank deposits were made by office staff other than the employee responsible for receiving and recording receipts. All checks required written authorization and two signatures. The FEC reports themselves were prepared by outside counsel, rather than an employee of the Committee.

The failure to file accurate reports was caused solely by "reasonably unforeseen circumstances," 11 C.F.R. § 111.35(b)(3)(i) – the criminal act of a long-term and trusted clerical employee. As explained, the failure immediately to detect the embezzlement of funds was also attributable in part to the inadequacy of the bank statements provided to the Committee by PNC Bank.

Both before and after the embezzlement was detected, the Committee made every effort to obtain and submit accurate information. The Committee ascertained the amount of the loss and immediately disclosed that information to law enforcement authorities, the Commission and others. Receipts and all expenditures unrelated to the embezzlement were accurately reported. And, the loss attributable to the embezzlement and receipt of funds attributable to the insurance proceeds were also accurately reported to the Commission.

In short, the Committee took relevant precautions and employed trained staff to review its records. Nevertheless, because of criminal acts that were not reasonably foreseeable, money was misappropriated and the reports filed did not immediately reflect that fact (because the Committee itself was not aware of it). And, the Committee ascertained the amount of the loss and accurately reported the fact, amount and cause of that loss to the Commission.

The Committee has thus demonstrated that best efforts were used to obtain and submit the information required by the Act. The Committee did not therefore violate the Act by failing to file reports reflecting the fact that money had been misappropriated. Because no violation of the Act occurred, no civil penalty or other fine should be imposed.

Lynn Fraser, Director
June 27, 2014
Page 7 of 8

Even if the Act was Violated, no Penalty Should be Imposed

Even if the Commission concludes that Committee violated the Act, no action should be taken against the Committee. The Committee, as noted, immediately and voluntarily called the Commission's attention to the fact that funds had been embezzled. In its Policy Regarding Self-Reporting of Campaign Finance Violations, 72 Fed. Reg. 16695-99 (April 5, 2007), the Commission recognized that "a person who brings to the Commission's attention violations of the FECA and Commission regulations and who cooperates with any resulting investigation will also receive appropriate consideration in terms of any eventual conciliation agreement. Among the options listed is that of taking no action against the respondent.

Consideration of the factors listed in the Commission's policy statement shows that, in this case, a decision to take no action would be appropriate.

The type of violation: The violation here was neither knowing nor willful. Nor did it result from reckless disregard for legal requirements. The Committee was not a wrongdoer. It was instead the victim of wrongdoing.

The magnitude of the violation: Although a significant sum was stolen, the only thing unreported was that amount, which was the result of a single employee's criminal conduct. All of the Committee's other expenditures and receipts were properly reported and available to the public. The only information not reported was information that the Committee itself did not possess. And, when that information was obtained, it was also reported.

The origin of the violation: The conduct resulting in the possible violation was not intended to advance the interests of either the Committee or the Insulators. The Committee had procedures in place designed to prevent and detect embezzlement. And, the only person who knew of the violation, Cora Carper, was a low-level clerical employee, rather than an official of the Insulators or the Committee.

Investigative and corrective actions: The violation ceased prior to its discovery (because Ms. Carper had already been discharged), and the Committee took appropriate corrective measures immediately. The Committee not only discharged Ms. Carper, it also assisted in her prosecution. The Committee also expeditiously notified the Commission and corrected the public record by working with the Commission to amend its reports.

Lynn Fraser, Director

June 27, 2014

Page 8 of 8

Post-discovery compliance: Following discovery of the embezzlement, the Committee adopted additional measures to insure that similar conduct would not reoccur. The Committee made arrangements with its bank for more informative and accurate bank statements. The Committee also assigned an employee, other than Ms. Carper's replacement, the task of reconciling the bank statements with the Committee's accounting records. And, Ms. Carper's replacement does not have access to blank checks or the ability to print checks at her desk. She can print checks only by retrieving them from the office manager's office.

Disclosure and Cooperation: The Committee fully disclosed to the Commission the loss and the circumstances of the loss. The Committee also cooperated with the Commission in its investigation, making documents available and answering all questions posed.

Under these circumstances, the Commission should refrain from taking any action against the Committee, not only because the Committee did not violate the Act, but also because the Committee satisfies the criteria in the Commission's policy on self-reported violations..

Other Considerations

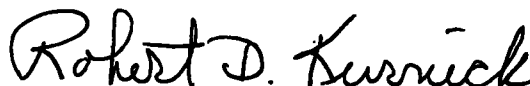
Although the point is obvious, it is worth mentioning that the Committee itself was the victim of a crime. Despite the fact that Ms. Carper was the person solely responsible for that crime and the violation of the Act, the Commission, in the addendum to her plea agreement, announced that it had no sought from her any civil penalty. It would, we submit, be grotesquely unjust to seek nothing from Ms. Carper, and impose a penalty on the Committee. The Commission would thereby be absolving the criminal and punishing the victim of her crime. Having decided that no civil penalty should be sought from the wrongdoer, the Commission should not now seek a civil penalty from the victim of her wrongdoing.

Please feel free to contact me to discuss this matter further.

Sincerely,

Sherman, Dunn, Cohen, Leifer & Yellig, P.C.

By:



Robert D. Kurnick